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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1966

No. 95

RUTH ELIZABETH CHAPMAN and
THOMAS LeROY TEALE,
Petitioners,

v.

THE PEOPLE OF THE STATE OF
CALIFORNIA,
Respondent.

On Writ of Certiorari to the Supreme Court
of the State of California

RESPONDENT'S PETITION FOR REHEARING

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RESPONDENT'S PETITION FOR REHEARING

Respondent, State of California, prays that this Court grant a rehearing of its judgment issued February 20, 1967, reversing the judgment of the California Supreme Court.

REASONS FOR GRANTING A REHEARING

1. This Court, in reversing the judgment of the California Supreme Court for applying California's harmless error rule to a *Griffin* violation, promulgated a new and novel harmless error rule which it stated is to be applied to federal constitutional errors. In so

doing this Court has cast aside the various harmless error rules hitherto adopted by some fifty states as well as the federal government. These rules through some fifty years of interpretations have had settled meanings. They could be applied by the respective courts within their respective jurisdictions in a harmonious manner. The adoption of this new rule by this Court introduces a new concept into harmless error rules. One which is unknown and untried on an appellate level, namely, a concept of "reasonable doubt."

This concept as stated in the majority opinion is that the "beneficiary of a constitutional error" is required "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (Slip Opinion, p. 6.) It is then stated (Slip Opinion, pp. 6–7):

> "We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. While appellate courts do not ordinarily have the original task of applying such a test, it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard, although achieving the same result as that aimed at in our *Fahy* case."

Is this concept in effect not a reversible error per se rule which the court states it specifically rejects?[1]

[1] See *Phillips* v. *California*, 684 Misc., O.T. 1966, 35 U.S. Law Week 3304 (Decided 2-27-67).

This court is not granting to the highest state courts the right to exercise their judgment on the effect of the error complained of on the case as a whole or even as would appear from the *Phillips* case pursuant to this new rule. A mistrust of state courts and their interpretation of this Court's decisions is displayed. This Court is seeking to preclude them from exercising their discretion in the light of the entire case before them to determine the impact of the error on the entire case.

California courts which have hitherto been in the forefront of progress in the administration of criminal justice have not tried to avoid the responsibilities of "new constitutional rights." On the contrary in certain instances they have accorded to defendants in criminal cases greater protections than those afforded by this Court (Cf. *People* v. *Cahan,* 44 Cal.2d 434, 282 P.2d 905; *People* v. *Dorado,* 62 Cal.2d 338, 398 P.2d 361; *People* v. *Aranda,* 63 Cal.2d 518, 407 P.2d 265). On this very question, a consideration of a *Griffin* error, California courts have demonstrated that they have applied their harmless error rule in a discretionary manner based upon the impact of the error on the entire case (Cf. pp. 24–25, fns. 12, 13, Respondent's Brief).

This new court-adopted rule placing the burden on the beneficiary of the error to display that the error was "harmless beyond a reasonable doubt" interjects a different element into appellate cases.

Reasonable doubt as defined in section 1096 of the California Penal Code is as follows:

> "'. . . It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.'"

Other states have other ways of expressing this concept of reasonable doubt. State courts cannot know whether their established concept is the one that this Court views as inherent in its language. Again, although it would appear we are engaged in a question of semantics, nevertheless are we not engendering more confusion instead of clarity into the field of criminal law?

This new rule substitutes a subjective standard for an objective standard which in its various forms has withstood the test of time for some fifty years throughout the nation. In the federal-state systems of courts will the purported beneficiary of such a new harmless error test ever be able to meet this standard. Can a state convince the multitude of judges to whom a defendant may individually resort for relief that any error would not beyond a reasonable doubt have contributed to the verdict? In the absence of such a belief, under this Court's new rule, it would be the duty

and obligation of the judge confronted with such a case, regardless of the entire case, to reverse or to grant the relief sought. This rule differs in minute degree, if at all, from a per se reversible error rule which this Court definitely rejected in the case at bar.

To comply with this new rule, state courts must find that the state has demonstrated beyond a reasonable doubt that the error complained of did not contribute to the conviction. In virtually every case each piece of evidence introduced at a trial or every statement made or instruction given by a trial judge in some manner contributes to the result. Thus can it ever be said that a particular act, later held to be erroneous, could not beyond a reasonable doubt have contributed to the result.

There is no question but that the rule as adopted by this Court will impede the administration of justice. Appellate courts will find themselves in the position of having to apply one test for federal constitutional errors and another test for state constitutional or procedural errors. The application of such double tests for each case will not encourage the speedy administration of justice. This will be contrary to the recommendations and tenor of the report by the President's Commission on Law Enforcement and Administration of Justice (Feb. 1967) which is to encourage the speedy administration of justice (pp. 155, 306, The Challenge of Crime in a Free Society).

Hence it is submitted that this Court should reconsider and grant a rehearing in this case to obviate the

problems presented to all state and federal courts by this newly adopted rule.

2. The adoption of the new rule was not constitutionally compelled and in fact the new rule enunciated by this Court is at variance with the specific rule on harmless error hitherto enacted by Congress and reflected in 28 U.S.C. § 2111 with reference to the federal appellate courts. This Court is familiar with and has fully considered the reason for the adoption of the rule in *Kotteakos* v. *United States*, 328 U.S. 750.

As recognized by the dissenting opinion of Mr. Justice Harlan in the present case, the harmless error rule was not designed to safeguard particular constitutional rights but the fundamental integrity of the judicial proceedings as a whole (Slip Opinion, dissenting opinion of Mr. Justice Harlan, p. 5). By the adoption of this new rule, this Court has signaled out particular types of error which are to be governed by federal standards only and to which state rules cannot properly be applied. It has ignored the affect of such errors on the case as a whole but has limited the particular application of the rule to certain types of errors. This is not accomplishing the end sought by the court in protecting the rights of the defendants from state intrusion. A defendant may be harmed more by a violation of a state rule than a violation of an alleged constitutional right; nevertheless, a far different standard is to be applied to such cases. The question of which federal constitutional rights are involved and what they are in light of changing interpretations is an unsettled area which this rule does

not illuminate. It will merely add to the upheaval in the field of criminal law.

3. The adoption of this new rule will without doubt affect the finality of state court judgments. It will render that many more cases subject to collateral attacks upon habeas corpus in federal district courts. This will then substitute the decision of one judge as to whether the state has borne its burden of proof beyond a reasonable doubt as to the nonharmful effect of any constitutional error for the considered opinion of the group of appellate judges comprising the bench of the highest state court. Is this test which courts are to adopt, in effect not a consideration of the error in the abstract—when it affects federal constitutional rights? Is the federal district judge to consider the error without any resort to the transcript of the state proceedings and in the solitude of his chamber place himself above the considered judgment of the state criminal administration processes? The result of the rule as enunciated by this Court could accomplish such result.

As in the case at the present, criminal judgments are losing any semblance of finality. Cases are pending in courts after judgment has been affirmed on appeal for many years. Criminals are being released upon society for failure of both the courts and the prosecution to be gifted with sufficient foresight to predict what new constitutional rights will be and to protect against any violation of them even though such later found violations were not believed to be any infringe-

ments of the defendant's rights at the time they were committed.

Certainly, we do not urge that state courts should not give full weight to this Court's decisions and implement to the best of their ability the judgments of this Court. We do believe, however, that where there is no compelling reason for an overturning of the long-considered and valid rules of state courts with relation to harmless error this Court should reconsider the adoption of this new appellate rule relative to federal constitutional rights, and not seek to return to a method repudiated by both Legislatures and Congress some fifty years ago.

This Court recognized in the limitation of its decisions in *Mapp* v. *Ohio,* 367 U.S. 643, *Griffin* v. *California,* 380 U.S. 609, and *Miranda* v. *Arizona,* 384 U.S. 436, by the cases of *Linkletter* v. *Walker,* 381 U.S. 618, *Tehan* v. *Shott,* 382 U.S. 406, and *Johnson* v. *New Jersey,* 384 U.S. 719, its concern for the orderly administration of criminal justice. By the adoption of the present rule, it would throw open all cases in which the state courts had applied their harmless error rules to allegedly federal constitutional errors for review by a federal district court. Patently, such a result would circumvent the previous limitations and without any basic reason for the change arrive at a different conclusion by entirely different standards.

An examination of California criminal cases in recent years fails to disclose virtually any case in which

California's harmless error rule was not invoked. The respective defendant's rights were not substantially impaired but the adoption of this new rule would require sifting through thousands of cases both reported and unreported to determine whether or not this new standard should have been applied. This, without doubt, could seriously impede the administration of justice.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that a rehearing be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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